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Rise and Fall of Nova Scotia's Attorney General: 1749–1983

*J. Murray Beck**

The performance of Nova Scotia's thirty-seven attorneys general in the 234 years between 1749 and 1983 has been influenced by a variety of factors. In part, it has been dependent on the kind of political regime they helped to work: representative government up to 1848; responsible government in a single province between 1848 and 1867; and federal government since 1867. But it has been strongly affected, too, by the training, character, and attitudes of the attorneys general themselves; so, while the office has undoubtedly done much to mould the man, the reverse has been no less true, especially before 1900.

Actually the office of attorney general of Nova Scotia still rests on the prerogative instruments issued to its pre-Confederation governors and lieutenant governors, even though those documents do not specifically mention the office by name. The commission to Governor Edward Cornwallis, whose founding of Halifax in 1749 signified the real beginning of English Nova Scotia, authorized him to appoint the "necessary officers and ministers in our said Province for the better administration of Justice and putting the Laws in execution."¹ Number 67 of his Instructions enjoined him to take care that his appointees "be Men of good Life and well affected to our Government and of good Estates and Abilities and not necessitous Persons."² Perhaps Cornwallis did not take sufficient care, for within four years Otis Little, his appointee as king's attorney, was dismissed for misconduct and left the province shortly afterwards as an absconding debtor.

Little's successor as king's attorney, William Nesbitt, came to be called attorney general early in his official career, even though evidence is lacking that he had received a commission designating him as such. Being recognized as attorney general, however, meant that he held an office which had been established in Britain many years before by an act of the prerogative and which had acquired wide common law powers, the beginnings of which are often lost in history. Although some of these

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1. See T. Akins, ed., *Selections from the Public Documents of the Province of Nova Scotia* (Halifax: Charles Annand, 1869), pp. 501–502.
2. See Public Archives of Canada, C.O. 218, Colonial Office (Nova Scotia), E. vol. 2.

powers and functions were inapplicable to the Nova Scotia situation, a primary function, the initiation, direction, and conduct of criminal prosecutions, became the major responsibility of Nova Scotia's attorney general. Nesbitt's first move to serve his own interests and at the same time enhance his office was to request remuneration for services to which no salary attached. Following his memorializing of the governor in mid-1755 that in the previous two years he had attended five sittings of the Supreme Court and eight of the Court of Quarter Sessions, and had prosecuted "two remarkable trials . . . which had occasioned him a good deal of trouble and taken up a great deal of time,"³ he was granted £50 for each year of service.

But, despite his best efforts, he was unsuccessful in his prolonged attempt to induce the Board of Trade in Britain to add the attorney general's salary to the annual grant provided by the British Parliament for Nova Scotia's civil establishment. Foiled in this direction, he pursued another, which he had twenty-four years to develop, the period from 1759 to 1783 in which he acted as speaker of the assembly. Dependent on its favour for the emoluments of office, he "transferred some of his allegiance from the official group [i.e., the Halifax compact] to the Assembly"⁴ and was appropriately rewarded. He was to be only the first of three attorneys general who sought to use the speakership to enhance the status and prestige of their legal office.⁵

Of the three, by far the most remarkable was Richard John Uniacke, a pre-Loyalist who participated, at least to a limited extent, in Eddy's Rebellion on the Chignecto Peninsula during the American Revolutionary War, was escorted in chains through Halifax, but who somehow or other escaped trial for treason. Even more remarkably, this man, who was once characterized as a "great lubberly insolent Irish rebel,"⁶ became attorney general in 1797 and held the office until his death thirty-three years later; his biographer, Brian Cuthbertson, aptly calls him "The Old Attorney General." Many times during those years he had only to ask for an assistant justiceship of the Supreme Court, but he refused to play second fiddle to his Loyalist arch-rival for office, Chief Justice Sampson Salter Blowers. More importantly, often by

3. Minutes of Council 3 June 1755.

4. J. B. Brebner, *The Neutral Yankees of Nova Scotia* (New York: Columbia University Press, 1937), p. 12.

5. Nesbitt's successor, James Brenton (1779-1781), who moved within two years to the Supreme Court, was apparently the first attorney general to receive a commission as such. For accounts of Brenton's two successors, Richard Gibbons (1781-1784) and Sampson Salter Blowers (1784-1797), see J. Doull, "The First Five Attorney Generals of Nova Scotia" (1945), 26 *Collections of the Nova Scotia Historical Society* 39-48.

6. See B. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus Publishing Limited, 1980), p. 15 [hereinafter Cuthbertson]. The characterization was that of Edward Winslow.

activities not even indirectly connected with the attorney generalship, he established for himself a position far more prestigious than that of any puisne judge. Even before being named attorney general he had been solicitor general for sixteen years, and at the time of his appointment he was serving his second stint as speaker of the assembly. Shortly after relinquishing the speakership he was admitted to the Council of Twelve, to which, since the time of Nesbitt's successor, James Brenton, it had seemed fitting that an office holder of the status of attorney general should belong. Occasionally, as senior councillor in attendance, Uniacke would preside over the body and his extreme Tory views on questions of church and state were certainly influential in its deliberations.

Adding further to his prestige was the publication in 1805 of *Uniacke's Laws*, his compilation of the Nova Scotia statutes from 1758 to 1804, which became the standard reference until the first revised statutes appeared in 1851. The money he needed to live up to the station to which he aspired became his during the War of 1812 when, as advocate general in the Court of Vice-Admiralty, he received large fees from the condemnation of prizes and amassed a fortune of £50,000. As a result, he was in a position to fulfill "his great dream of a country house and estate."⁷ Eventually he would acquire more than 11,000 acres in the wilderness about twenty-five miles from Halifax, on which he built Mount Uniacke (now Uniacke House) between 1813 and 1815. If more were needed, the fact that he had influential patrons in Britain and Ireland, and a temperament unwilling to tolerate anything detracting him from his dignity, meant that no one would challenge him with impunity.

As attorney general, Uniacke participated in one of the few early Nova Scotian instances in which that officer gave his opinion on a significant constitutional matter. In the celebrated Walker case of 1806–1807 Governor Sir John Wentworth refused to recognize the sole right of the assembly to determine the validity of elections. Uniacke, a moderate Tory in constitutional matters, disagreed and held that the *lex et consuetudo parliamenti* applied no less to the Nova Scotia Assembly than to the British Commons. Although the English law officers did not go that far, they did agree with Uniacke's conclusions, holding that it was an inherent right of colonial assemblies to decide on the validity of elections.⁸ As was usual, Uniacke's main role as attorney general was to conduct criminal prosecutions, but in one of them he did not participate, that of his son Richard John Uniacke Jr., who in 1819 killed merchant William Bowie in the last fatal duel on record in Nova Scotia. "With his

7. *Id.*, p. 62.

8. J.M. Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957), pp. 53–54.

fine white locks falling over his herculean shoulders, carrying a big ivory-headed cane and wearing an eye glass,"⁹ he escorted his son into court and remained until he was acquitted. Even in 1830, the last year of his life, Uniacke travelled the spring circuit of the Supreme Court, prosecuting cases with his usual vigour. For some time, however, the practice had been for the court, in the absence of the attorney and solicitor general, to appoint a King's Counsel in their place. By the time of the first revised statutes in 1851, the practice had been confirmed by statute and a maximum fee of \$20 allowed for each prosecution conducted by a Queen's Counsel or other barrister. This procedure was to be followed for another thirty-six years.

Uniacke's successor as attorney general, Samuel George William Archibald, had the unenviable task of serving in the office as the province changed from partyless to party politics during the 1830s. Archibald had apparently been christened Samuel George Washington Archibald, but changed his name to further his chances of getting ahead. Admitted to the bar in 1805 and elected to the assembly a year later, he had so progressed by 1817 that the governor, Lord Dalhousie, made him and W.H.O. Haliburton Nova Scotia's first King's Counsel. One historian has suggested that by this time he had become "the Sir James Scarlett of Nova Scotia, the greatest verdict-getter we have ever known."¹⁰ Others have suggested that he was neither learned in the law nor willing to undertake the drudgery of ferreting out "the dry detail of the law connected with a cause"; that he was, in fact, not "the great jurist of the family legend but a quick-witted story-telling jury lawyer, who talked himself out of scrapes when a lad, and later into the jobs he coveted."¹¹ Actually, the truth seems to be that, when he prepared himself adequately, he had the intellectual capacity to act ably both as a lawyer and a judge.

In the 1820s he moved further towards the prize he craved, the chief justiceship, by being elected speaker of the assembly in 1825 and appointed solicitor general the following year. Three years later he was in contention with several others to succeed Chief Justice Sampson Salter Blowers who, approaching ninety, would soon vacate the office. Then, in 1830, at the very peak of his career, fate dealt him an unkind blow. Neither a reformer nor a populist, but a constitutionalist, he came into conflict with the Council of Twelve in the celebrated "Brandy Dispute," when that body insisted on amending a money bill, a power it possessed in law, but which it had long left in abeyance. Descending from the speaker's rostrum, he called on the assembly not to surrender

9. Cuthbertson, p. 77.

10. G. Patterson, *Studies in Nova Scotian History* (Halifax: Imperial Publishing Co., 1940), p. 49.

11. K. MacKenzie, *Sabots and Slippers* (Toronto: Rous & Mann Press, 1954), p. 85.

"the dearest of all rights, that of taxing ourselves, without the intervention or dictation of any power upon earth."¹² Joseph Howe's *Novascotian* declared that his speeches on this occasion placed him "on an elevation which in the whole course of his political life he never before attained."¹³ Although he secured the attorney generalship on Uniacke's death in 1830, two years later the chief justiceship went, not to him, but to Brenton Halliburton, supposedly because he had been performing the duties of Blowers for some time. But Haligonians in the know were convinced that Archibald had forfeited his chances the moment he assumed the leadership of the popular side in the brandy dispute.

As attorney general, Archibald conducted the prosecution in the most celebrated of provincial trials, that of Joseph Howe for criminal libel in 1835, which is wrongly believed to have established the freedom of the press in Nova Scotia. In addressing the jury, Archibald suggested that the law was so definite and Howe's power of reasoning so clear that, were he a member of the jury, he might be persuaded to convict himself. Throughout the proceedings, however, Archibald was deliberately moderate, fully realizing that this was one jury trial he could not possibly win.

During the 1830s Archibald became more and more uncomfortable in his roles both as speaker and attorney general. In the election of 1836, the first conducted on party lines, he found himself assailed as a supporter of the old order by "Joe" Warner, the pseudonym of John Young, known province-wide for his encouragement of agriculture. Exasperated, Archibald declared, in bitterness that was rare with him, "my name shall remain . . . when the name of Joe Warner shall be rotten as his compost, and stink like his dung hill."¹⁴ The result of the election was an assembly largely polarized between Tories and Reformers in which he was perhaps the only independent. Generally a supporter of the status quo, he was more than once placed in the highly uncomfortable position of having to decide between the conflicting forces. The worst dilemma of all—one arising in his combined roles of speaker and attorney general—arose in 1840 when the assembly demanded the recall of the governor, Sir Colin Campbell, for his refusal to acknowledge that a Colonial Office dispatch of the previous October had conferred "a new and improved constitution" upon the colonies. Asked by Campbell for his opinion of the dispatch, Archibald replied that, although it would be improper for him to oppose the assembly's wishes, the governor was entitled to his views in his capacity as attorney general. Accordingly, he expressed doubt that the dispatch could bear the interpretation that the assembly placed upon it, and was confident that Campbell had acted

12. See *Novascotian*, 7, 8 (supplement), 15, and 22 April 1830.

13. *Id.*, 7 April 1830.

14. *Novascotian*, 8 December 1836 (supplement).

properly in requesting instructions from the colonial secretary.¹⁵ Clearly "the opinions of the majority of the House, had outrun those of its Head."¹⁶ Aged and ailing, Archibald was glad to relinquish his two offices in 1841 to become master of the rolls. He would be the last non-party attorney general of Nova Scotia.

His successor, J.W. Johnston, named provisionally in the normal fashion by the governor, Lord Falkland, and confirmed later by the colonial secretary, was, at the time of his appointment, *de facto* leader of the Tory party and, after the breakdown of the Tory-Reform coalition ministry in 1843, was recognized by the governor as leader of the government and, since then, by many students, as the first premier of the province. As such, he exercised greater power than any previous attorney general since, although responsible government had not been conceded, the governor almost invariably followed his advice in domestic matters. But neither his prestige nor the respect accorded him were similarly enhanced. In the "war to the knife" which began in 1844 between the Reformers on the one hand and Falkland and the Tories on the other, Johnston and the governor were often the butt of ridicule in a torrent of pasquinades and lampoons appearing in the Reform press.¹⁷

King Pharaoh [Falkland] stood within the Hall,
and Sycophants were round him,
Whose oily tongues had render'd him, just
twice the fool they found him. . . .
The Leader of his host [Johnston] stood by, a Satrap
fierce and wily,
Who hoped on Pharaoh's mad resolve to
build his power slyly,
He fanned his rage, and drew him forth,
with all his hosts behind him,
And now, engulfed, o'erwhelmed and lost,
the Chroniclers may find him.

In turn, Johnston used his undoubted powers, not as attorney general, but as a Tory lawyer, in several civil libel actions against the Liberal Richard Nugent, who had succeeded Joseph Howe as proprietor of the *Novascotian* and who was fearless, even foolhardy, in his denunciation of the Tories. Some of these cases took on the appearance of state trials as Johnston and Alexander Stewart, the most despised of all the Tories, appeared for the plaintiffs, while William Young, the province's leading Liberal lawyer, and his brother George acted for the

15. I. Longworth, *Life of S.G.W. Archibald* (Halifax: S.F. Huestis, 1881), pp. 145-146.

16. *Id.*, p. 146.

17. See J.M. Beck, *Joseph Howe: Conservative Reformer 1804-48* vol. 1 (Kingston and Montreal: McGill-Queen's University Press, 1982), pp. 274-277.

defendant. Johnston realized his objective in getting rid of Nugent, at least temporarily, by having him mulcted in heavy damages and imprisoned and by forcing him to dispose of his interest in the *Novascotian*.¹⁸ But, if anything, these activities contributed negatively to the status of the attorney general.

With the coming of responsible government in 1848, the appointment of the attorney general assumed its present form. Henceforth, he would be the choice of the person who led the party which held a majority of seats in the Assembly, i.e., the premier or leader of the government, as he was more commonly called at the time. Since the first three leaders of the government under responsible government were attorneys general, that fact alone might have led to a pronounced enhancement of the office. But two things militated against the possibility. For one thing the premier of that day stood much more in the relation of *primus inter pares* to his colleagues than he would later. For another, each of the three had obstacles preventing him from assuming a more dominant role.

James Boyle Uniacke, son of the "The Old Attorney General," the first premier acting under responsible government in the British Empire overseas, and a Tory turned Reformer, had been recognized as leader of the Reform party only because its *de facto* leader, Joseph Howe, had damaged his position by his harsh treatment of the governor, Lord Falkland. Something of a dilettante, Uniacke performed at his best only when the spirit moved him, and he could hardly have been comfortable in a ministry dominated by Howe's ideas and energy. Following a stroke in 1851 his activities steadily diminished. According to a nephew, "the last 7 years of his life he was more or less paralyzed," and during the session of 1854 a Liberal member reported him as "fairly used up and wholly unfit for public business."¹⁹ Because of financial necessity, however, he lingered on as attorney general until April 1854, when his colleagues eased him out and appointed him commissioner of crown lands, a position he was incapable of filling properly.

His successor as leader of the government and attorney general, William Young, came from a family which had not gained the respect it anticipated because of a common belief that its members carefully calculated their actions in terms of their personal interests. William himself had declined a minor ministerial post in 1848 to enable him to retain his more prestigious position as speaker of the assembly and to augment his personal fortunes in the practice of law and business pursuits. In accepting the two offices in 1854, he clearly regarded them

18. *Id.*, pp. 256, 362-363, n. 75.

19. Extract from a letter of Crofton James Uniacke, Public Archives of Nova Scotia [hereinafter PANS], MG I, vol. 1769, item 35; James McKeagney to William Young, 15 April 1854, William Young Papers, PANS, MG 2, 733:377.

as a stepping stone towards the greatest prize of all, the chief justiceship. But it soon became apparent to his friends and opponents alike that he simply could not manage men. A leading Liberal, Jonathan McCully, complained bitterly to Howe about "the statesmanship of the Premier. A good many People begin to think he is not a witch."²⁰ By March 1856 the *Acadian Recorder*, with some truth, pictured Young as "once, twice, or thrice, every day, piteously calling his 'followers' together in 'caucus,' that he may count them once more, and see if all are there."²¹ Intrigue abounded and in 1857 the ministry collapsed following Howe's bitter embroilment with the Irish Catholics.

For a second time J.W. Johnston became leader of the government and attorney general, but it was a changed Johnston. Aging and fatigued, he had lost much of his old zest for party warfare and, like Young, had his heart set upon the chief justiceship which octogenarian Brenton Halliburton would soon have to relinquish either by death or resignation. Much of the government's leadership, therefore, fell upon a young, vigorous, rabidly partisan physician from Cumberland County, Charles Tupper, who would be a major force in Nova Scotian politics for the next half century. When Halliburton died in 1860, the Liberals (Reformers) chanced to be in office, and Young, not Johnston, became chief justice. Clearly neither Uniacke, Young, nor Johnston had been able to use his position as leader of the government to enhance the prestige of the office of attorney general or its occupant.

If anything, the post-Confederation era has seen a lowering of the status of the office of attorney general both politically and, more recently, legally, but not necessarily a lessening in the respect for specific occupants of the office. Eleven of the twenty-four attorneys general since November 1867²² have received appointments to the Exchequer Court of Canada or the Supreme and County Courts. Since the time of James Brenton in 1781 Nova Scotia's lawyers have realized that elevation to the bench is most readily secured through service as attorney general; however, it would be difficult to show that the desire of attorneys general for this kind of advancement bears any relationship to the loss in status of their office. Of the twenty-four attorneys general only one, John Sparrow David Thompson, has been premier and he for only fifty-four days because of his government's defeat at the polls in 1882. Since fifteen of the eighteen premiers in the same time span had training in law, they had every opportunity to assume the portfolio, but chose not to do so. In part, it might be that, since every House of Assembly has a plethora of lawyers, the premiers have had a wide field of selection for their attorneys general, but that is not the major reason.

20. McCully to Howe, 30 August 1856, Joseph Howe Papers, vol. 2, pp. 570-3.

21. *Acadian Recorder*, 8 March 1856.

22. In other words, since the first post-Confederation election.

For many years following Confederation the province's most pressing problems were financial, especially the need to maintain the road and educational systems and expand the railway system. Not surprisingly, William Annand, the first premier after the post-Confederation election, held the provincial treasurership from 1867 to 1875. The office of provincial treasurer was further enhanced in 1878 when, because of financial stringency, the provincial secretary became provincial treasurer *ex officio*. The result was that, in the fifty-two years which followed, the premier was also provincial secretary and provincial treasurer for all but four years.²³ Two of the province's four major post-Confederation leaders, W.S. Fielding and George H. Murray, held the office for thirty-eight years, their power enhanced through the exercise of this combination of functions and responsibilities. The latter were further augmented after 1900 when, with the development of the positive state, practically all the new governmental functions were administered by the department of the provincial secretary. Not until 1918, when new departments incorporating these functions began to be established, did a slow process of dismantling the department occur, which eventually left it a hollow shell of its former self.

In contrast, the attorney general's department by its very nature remained a stagnant one after 1867. Because its work was primarily administrative, its head as such could not be a major instrument of policy making. To some critics an enactment of 1877 which, for reasons of economy, required the attorney general to become commissioner of crown lands as well, was altogether demeaning to the former. The two offices, said Otto Weeks, a former attorney general, were altogether incongruous: "One could not imagine an Attorney General in England charged with the duties of another department. . . . It could not fail to take away from the office of Attorney General the dignity which should ever surround it."²⁴ Nevertheless, the combination of the two departments remained unaltered for seventy years.

Fate also decreed that the post-Confederation attorneys general up to 1922 often detracted from the stature of the office. The exception was John Sparrow David Thompson who, as Professor Waite shows, was an ornament to his profession and the government service. Daniel McDonald (1875), Arthur Drysdale (1905-1907), W.T. Pipes (1907-1909), and A.K. MacLean (1909-1911) did not hold the portfolio long enough to leave their imprint upon the department. But, for the remaining forty-five years, the occupants of the office were either

23. The exceptions were John S.D. Thompson (attorney general, 1882); W.T. Pipes (without portfolio, 1882-1884), and E.H. Armstrong (commissionership of public works and mines, 1923-1925).

24. N.S. Assembly Debates (8 March 1877) at 73.

eccentrics, mediocrities, or men whose other failings were all too apparent.

The unreconstructed Tory, Martin Wilkins (1867–1871), who became an anti-Confederate (Liberal), propounded a species of constitutional folklore for which he would become notorious, especially his contention that the British Parliament was legally incapable of passing the British North America Act (now the Constitution Act, 1867 (U.K.)), c. 3; naturally the law officers of the crown in England gave it short shrift. Later Wilkins got into trouble with the lieutenant governor, Sir Hastings Doyle, for saying that if all other means of getting out of Confederation failed, “we’ll appeal to another nation.” Asked by Doyle if he uttered these “disloyal sentiments,” he replied that he was “incapable of entertaining or expressing” that kind of sentiment and, on the governor’s insistence, agreed to have his disavowal published.²⁵ Having made himself a laughing stock, Wilkins left politics in 1871 to accept the prothonotaryship of the Supreme Court at Halifax where, said Joseph Howe, he could “pass the rest of his days in swearing witnesses to do what he never did himself—to tell the truth, the whole truth, and nothing but the truth.”²⁶

Wilkins’ successor, Henry W. Smith, cannot be described as anything more than mediocre. To the repeal delegation which went to Britain in 1868 he contributed little or nothing. The assembly *Debates* indicate that his performance in that body was very ordinary, elevation to the bench appearing to be his major concern. The fellow judge who paid tribute to him at the time of his death, declared that “he had his faults, as we all have, but they will not deter, the good opinion we all had of him,”²⁷ an honest but somewhat unusual statement on an occasion of this kind.

Little is known of the performance of Daniel McDonald, Smith’s successor as attorney general. Some have suggested that he was only a stopgap appointee; others that he, an unduly sensitive man, resigned abruptly after less than a year because of criticism relating to his department. In naming Otto Schwartz Weeks (1875–1877) to succeed him, Premier P.C. Hill knew he was taking a chance. He had no doubt about Weeks’ legal qualifications, and he seemed just the man to cope with the most bellicose opposition in provincial history, something which Hill and his other ministers had been unable to do. But he had exhibited all sorts of eccentricities and was widely known for his intemperance. Once,

25. See D. Harvey, “Incidents of the Repeal Agitation of Nova Scotia” (1934), 15 *Canadian Historical Review* 48–56.

26. J. Chisholm, *The Speeches and Public Letters of Joseph Howe*, vol. 2 (Halifax: The Chronicle Publishing Company, 1909), p. 604.

27. See J. Doull, “Four Attorney-Generals” (1947), 27 *Collections of the Nova Scotia Historical Society* 12.

it was said, he had fired a shot at his wife and a stray pellet struck her in the leg; sometimes while lying in bed, he diverted himself by firing shots into the ceiling of his hotel room. During the session of 1876 he did a great deal to ease Hill's difficulties by meeting Conservatives Holmes, Woodworth, Longley, et al., on their own terms. As usual, he cut an imposing figure with his "black frock coat, . . . large expansive shirt front, . . . white tie . . . long gold chain . . . that ended in a small watch in his vest pocket . . . topped . . . with a tall grey beaver."²⁸ But once the session was over his intemperateness resulted in long absences from office and failure to transact the departmental business. Although the air was full of charges against his character, he made no attempt to refute them. Asked to resign, he refused, and Hill had his office vacated by order in council.

Alonzo J. White, who followed Weeks and served two stints as attorney general (1877-1878; 1882-1886), made no enemies for the government and proved not to be a political hindrance. But he can best be described as a mediocrity; indeed, in contrasting him with Weeks, it is probably "fair . . . to say that Weeks was brilliant but not respectable and that White was respectable but not brilliant."²⁹

Following him was James Wilberforce Longley (1886-1905), who during his nineteen years in office engaged in a host of other activities, including writing the biographies of two leading Nova Scotians, Joseph Howe and Charles Tupper. Although later, as a member of the Supreme Court of Nova Scotia, his fellow judges were inclined to think lightly of his capacity, he gave general satisfaction in performing his duties as attorney general. But he had faults calculated to harm himself and his party politically. Possessed of the gift of sarcasm, and a master of ridicule, he "never, in private or public, could deny himself of the pleasure of saying a sharp and biting thing." Once, while the guest of an old Liberal friend in Yarmouth, he said that he never ate late at night. When his host replied that he could eat at any time, Longley could not forbear a typical reply: "Quite so; some animals, notably the hog, can eat till they are replete and then lie down and sleep."³⁰

Fortunately for the Liberals, Longley left the assembly temporarily in 1896 to contest the federal election and, incidentally, to be defeated. Otherwise, when W.S. Fielding gave up the premiership for federal politics only a few weeks later, he might have had no choice but to propose him as his successor. Instead, he could put forward George H. Murray, the man with sunny ways, who remained premier for the next twenty-six years, while Longley, who easily made enemies but never

28. *Id.*, p. 15.

29. J. Doull, *Sketches of Attorney Generals of Nova Scotia* (Halifax: Queen's Printer, 1964), p. 98 [hereinafter Doull, *Sketches*].

30. See note on J.W. Longley, PANS, MG 100, vol. 177, no. 22.

apologized or placated them, continued as attorney general and an excellent back-up man to the premier.

The remarkable thing about Orlando T. Daniels (1911–1922) is that he held the attorney generalship for eleven years. In 1914 he had his name somewhat sullied in a crown lands transaction when a royal commission adjudged him not guilty of corrupt motives, but found him “gravely imprudent” in placing himself “in a position which might have involved, at a later date, a possible complication between his private interest and his public duty.” It was said about him that “on his first appearance in Court he received such harsh treatment from the presiding judge that he never attempted to conduct another case in the higher courts.”³¹ During most of his time in office he left its administration to an able deputy attorney general, Stuart Jenks, who willingly took on the responsibility of directing the department.

W.J. O’Hearn, who followed Daniels (1922–1925), at least tried to inject new life into the office of attorney general. Earlier it has been noted that even before 1830 the practice had developed by which a judge could appoint a King’s Counsel to conduct prosecutions in the absence of the attorney general. In 1869, when Attorney General Wilkins sought to provide more explicitly for his absences in his celebrated “illness or preoccupation” bill, he was balked by the Legislative Council. “The country paid a large salary for [Wilkins’] services,” said one assembly member, “and should not have to pay a lawyer to do his work in consequence of his being pre-occupied.” Wilkins replied simply that he was not gifted with ubiquity and that his public duties were incompatible with his constant attendance at court.³²

Not until 1887 did the government of the day finally recognize the facts of life: The prosecution of cases personally by the attorney general would in future be exceptional and, in his absence, the presiding judge almost invariably chose the senior Queen’s Counsel who was “often far from being the most competent person to conduct the criminal business on behalf of the crown.” Accordingly, at the instance of James Wilberforce Longley, legislation was enacted authorizing the attorney general to “appoint some Queen’s Counsel, or other competent barrister of the court, to attend to the criminal business of each sitting of the Supreme Court in each county.”³³ In a sense, then, Attorney General O’Hearn was turning the clock back when, in 1922, he promised to conduct personally all criminal cases of an important character throughout the province and other litigation of consequence for the crown in the Court of Appeal.³⁴ O’Hearn was as good as his word, but in two years he was

31. (1914) *Canadian Annual Review* 528; Doull, *Sketches*, p. 119.

32. N.S. Assembly Debates (28 May 1869) at 123–124.

33. *Id.* (22 March 1887) at 42; 50 Vict., c. 6.

34. *Halifax Herald*, 4 January 1923.

out of office and apparently none of his successors has chosen to follow his example.

Shortly afterwards Attorney General W.L. Hall (1926-1931) adopted a course unprecedented in Nova Scotia but followed in the 1880s by Oliver Mowat, premier and attorney general of Ontario. While in opposition, Hall's Conservative party had promised to abolish the Legislative Council, the upper branch of the legislature, but balked in other directions when in office, it tried the legal approach. Accordingly, Hall appeared in person before the Judicial Committee of the Privy Council in 1927 to argue that legislative councillors could be removed and replaced by an exercise of the prerogative power, and that for this purpose the power was vested in Nova Scotia's governor in council. His arguments having been accepted, the Legislative Council passed out of existence in 1928.

Although such instances of originality by modern Nova Scotia attorneys general are rare, two caveats should be entered. Even if decreased in relative importance, the functions of the attorney general's department are still significant and, even if its policy-making role is minimal, its head, as a member of the cabinet, may play an important role in determining general government policy. That was certainly true of J.H. MacQuarrie, attorney general between 1933 and 1940 in the first Angus L. Macdonald ministry, probably the strongest in provincial history. Today, too, most attorneys general administer an additional department, perhaps two, the duties of which may occupy most of their attention. So when the Stanfield government took office in 1956, Attorney General R.A. Donahoe's major concerns were the Departments of Public Health and Public Welfare.

Recently the office of the attorney general and its occupant have been challenged much more seriously through the legal and constitutional process than they had ever been through the political and governmental process. Although the clash did not become fully joined until 1969, it had been latent since 1867. In its essence it involved a conflict between two subsections of the British North America Act (now the Constitution Act, 1867 (U.K.)), c. 3: which empowered the federal Parliament to make laws relating to criminal law and procedure in criminal matters, and 92(14), which empowered the provincial legislatures to make laws relating to the administration of justice. The first sign of clash appeared in 1869 when the anti-Confederate government of Nova Scotia was engaged in a continuing struggle with Ottawa, and Attorney General Martin Wilkins sought to relieve the province of paying the cost of criminal prosecutions. In a submission to the federal government he took the position that "the prosecuting of criminals, though accessory, or incident to, *the administration of justice*, forms no part of it." Hence, although Nova Scotia's pre-Confederation procedures for the conduct of criminal prosecutions remained operative for

the time being as the B.N.A. Act stipulated, the federal Parliament might regulate the matter at any time because of its exclusive control over the criminal law and the procedure in criminal matters; accordingly, it should pay the cost of criminal prosecutions.³⁵ The next year Wilkins actually carried through the anti-Confederate assembly a bill for the repeal of the Nova Scotia legislation relating to paying the cost of criminal prosecutions, but the Legislative Council, fearful that persons accused of crime would go unprosecuted, gave the bill the three months' hoist.³⁶ Except for its actions, the constitutional question might have been settled at that time.

Two years later, in 1873, at the instance of Attorney General H.W. Smith, the Nova Scotia assembly by resolution asked again to be relieved of the burden of prosecutions, but got the same reception as Wilkins: the cold recognition of a formal acknowledgment.³⁷ The question was still in abeyance in 1887 when Attorney General Longley introduced his bill for the appointment of county prosecutors. Accordingly, he inserted a preamble stating that the measure merely effected an improvement in the conduct of prosecutions until doubts about responsibility for the payment of the expenses were resolved. But when John S.D. Thompson, by this time the minister of justice in Ottawa, left the Act to its operation, he indicated that he had no doubt that the provincial government was responsible for defraying the cost and, seemingly, for the institution and conduct of criminal prosecutions.³⁸

Apparently Nova Scotia accepted this opinion when, in 1900, it finally spelled out by statute the functions and powers of the attorney general along much the same lines as had Quebec, Manitoba, and British Columbia.³⁹ Although the Act did not mention the prosecutorial function in specific terms, it did so inferentially by conferring upon the provincial attorney general all the powers of the attorney general of England that were applicable to Nova Scotia as well as those belonging to the pre-Confederation attorneys general of Nova Scotia that were still within provincial jurisdiction.

In any case the prevailing state of affairs remained until 1969 when the Canadian Parliament amended the definition of "Attorney General" in the *Criminal Code* so that in future the attorney general of Canada

35. N.S. Assembly Journals (1870), Appendix 6: Criminal Prosecutions, at 2.

36. N.S. Assembly Debates, (13 February 1871) at 40-42; N.S. Legislative Council Journals (1871) at 41.

37. N.S. Assembly Journals (1873) at 66-67; N.S. Assembly Debates (3 April 1873) at 138-139.

38. N.S. Assembly Debates (22 March 1887) at 42; W. Hodgins, *Correspondence, Reports of the Ministers of Justice and Orders in Council Upon the Subject of Dominion and Provincial Legislation, 1867-1895* (Ottawa: Government Printing Bureau, 1896), pp. 571-572.

39. R.S.N.S. 1900, c. 10, s. 3.

through federal agents might prefer indictments and conduct the entire proceedings in cases involving crimes under federal law other than the *Criminal Code*. In itself the enactment was not momentous since for some decades an arrangement had been recognized by which agents of the attorney general of Canada had prosecuted drug and combines offences, which are laid down in separate federal statutes, not in the *Criminal Code*, although always in the name of a provincial attorney general. What was astounding to Nova Scotia and the other provinces was the constitutional law enunciated at the time by John N. Turner, minister of justice and attorney general of Canada, an enunciation which would have permitted the federal authority to assume the prosecutorial role under the *Criminal Code* whenever Parliament legislated to that effect. That role, said Mr. Turner, was "a matter purely relating to the criminal law and to criminal procedure" and hence fell under subsection 91(27) of the B.N.A. Act. On the other hand, subsection 92(14) was "a legislative power to make laws for the administration of justice. It has nothing to do with the prosecution of criminal law and procedure under the heading in Section 91." Any powers that a provincial attorney general had exercised in these matters, he concluded, had been conceded by Parliament under the *Criminal Code* by definition, and they might therefore be withdrawn without invading provincial jurisdiction.⁴⁰

The attorney general of Canada having used his new powers to prosecute and convict Patrick Arnold Hauser of Alberta under the *Narcotic Control Act*, R.S.C. 1970, c. N-1, his lawyers challenged the validity of the legislation under which the attorney general of Canada had acted entirely on his own. It was expected, when the Supreme Court of Canada rendered its decision in the *Hauser* case⁴¹ in 1979, that it would decide definitively on the distribution of powers as it related to subsections 91(27) and 92(14) of the B.N.A. Act. Following Turner, the federal government's lawyers argued that, by virtue of subsection 91(27), Parliament might confer upon the attorney general of Canada the prosecutorial role in all cases arising under federal law, while Nova Scotia, reversing the position of Martin Wilkins more than a hundred years earlier, joined the other provinces in resisting that contention.

By somewhat dubious means a majority of the Supreme Court of Canada managed to avoid dealing with the chief constitutional issue. All seven judges who heard the case agreed that the federal Parliament had jurisdiction in cases involving the enforcement of federal laws which did

40. Minutes of Standing Committee of the House of Commons on Justice and Legal Affairs (4 March 1969), pp. 155-156.

41. *R. v. Hauser*, [1979] 1 S.C.R. 984, [1979] 5 W.W.R. 1, 26 N.R. 541, 16 A.R. 91, 8 C.R. (3d) 89, 281, 46 C.C.C. (2d) 481, reversing [1977] 6 W.W.R. 501, 7 A.R. 89, 37 C.C.C. (2d) 129, 80 D.L.R. (3d) 161, which reversed 7 A.R. 240.

not have a criminal law base. Four judges of the majority of five held that the *Narcotic Control Act* was not in its essence criminal law. Since it dealt with a genuinely new problem of great significance, it fell within the federal government's peace, order, and good government power and, hence, could be enforced by federal authority. Accordingly, these judges needed to proceed no further.⁴² On two counts their reasoning was unconvincing, if not incomprehensible: Earlier decisions had treated the *Narcotic Control Act* as criminal in essence and had let the peace, order and good government clause be used in only the most extraordinary of circumstances. The fifth member of the majority, Mr. Justice Spence, reached his conclusion by a different route, holding that enforcement power must be coterminous with legislative power.⁴³ The acceptance of such a position would, of course, mean that all federally created crimes would be subject to the federal enforcing power and, if the federal Parliament chose, sound the death knell of the provinces' role in the prosecution of crimes.

Mr. Justice Dickson, in a dissenting judgment concurred in by Mr. Justice Pratte, agreed that normally the legislative power carried with it the enforcing power. But in this case the exclusive federal power to make laws relating to the procedure in criminal cases was countered by the exclusive provincial power to make laws for the administration of justice, including criminal justice. Accordingly, Dickson, J. held that an all-encompassing meaning should not be given to the former power. He did it by limiting the federal power to the right to define the form or manner of conducting criminal prosecutions and empowering the provinces to direct the judicial process by which all the criminal law is enforced, whether within or without the *Criminal Code*.

To him this reconciliation would meet the apparent view of the Fathers of Confederation that "the countless decisions to be made in the course of administering criminal justice could best be made at the local level." In addition, the legislative history, governmental attitudes, and case law all led him to the "inescapable conclusion" that the supervisory functions of the attorney general in the administration of criminal justice had always been considered to fall to the provinces. Accordingly, the federal legislation of 1969 might be viewed not only as an attempt to "intrude into matters traditionally reserved for the provincial Attorneys General" but also as "a breach of the bargain struck at the time of Confederation." To accept the federal government's contention would, in effect, change subsection 92(14) from "the administration of justice" to "the administration of civil justice" and in criminal matters there would be "one Attorney General for the whole of Canada and that Attorney General would be the federal Attorney General." "There is a

42. *Id.*, at 990-1001 [1979] 1 S.C.R.

43. *Id.*, at 1001-1006.

need . . .,” he concluded, “to maintain the ‘subtle balance’ between national and local interests envisaged in our Constitution, leaving the administration of justice in provincial hands where it could be more flexibly administered in response to local conditions.”⁴⁴

In a sense, then, the sword of Damocles hangs over the heads of the attorney general of Nova Scotia and his provincial counterparts. They cannot, of course, be denied the right of directing the prosecution of offenders against provincial laws, who today are myriad, in cases relating to alcohol and motor vehicles. But extension of the federal legislation of 1969 to include the crimes in the *Criminal Code*, combined with a majority decision of the Supreme Court following Mr. Justice Spence’s line of reasoning, would alter drastically their office as it now exists by depriving them of any participation in the prosecution of crimes. That is unlikely to happen, however, barring some momentous circumstances not presently apparent. Even in the unlikely event of a federal government’s wanting to pursue such a course, the mere thought of the opposition it would evoke, coupled with the costs, would likely be deterrent enough. In all probability the office of attorney general will remain much as it is, its status and that of its occupant only marginally altered through the legal and constitutional process, substantially diminished through the political and governmental process, but still having an important role to play in the performance of its historic function.

Appendix

Attorneys General of Nova Scotia

Otis Little	1749–1753
William Nesbitt	1753–1779
James Brenton	1779–1781
Richard Gibbons	1781–1784
Sampson Salter Blowers	1784–1797
R.J. Uniacke	1797–1830
S.G.W. Archibald	1831–1841
J.W. Johnston	1841–1848
J.B. Uniacke	1848–1854
William Young	1854–1857
J.W. Johnston	1857–1860
A.G. Archibald	1860–1863
J.W. Johnston	1863–1864
W.A. Henry	1864–1867

44. *Id.*, at 1006–1061.

Hiram Blanchard	1867
Martin Wilkins	1867-1871
H.W. Smith	1871-1875
Daniel McDonald	1875
Otto Weeks	1875-1877
Alonzo J. White	1877-1878
John S.D. Thompson	1878-1882
Alonzo J. White	1882-1886
J.W. Longley	1886-1905
Arthur Drysdale	1905-1907
W.T. Pipes	1907-1909
A.K. MacLean	1909-1911
O.T. Daniels	1911-1922
W.J. O'Hearn	1922-1925
John C. Douglas	1925-1926
W.L. Hall	1926-1931
John Doull	1931-1933
J.H. MacQuarrie	1933-1947
L.D. Currie	1947-1949
Malcolm Patterson	1949-1956
R.A. Donahoe	1956-1970
Leonard Pace	1970-1972
Allan Sullivan	1972-1976
Leonard Pace	1976-1978
George Mitchell	1978
Harry How	1978-1983
Ron Griffin	1983-